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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SHERRI GORDON, Defendant and Appellant.	A150529 (Contra Costa County Super. Ct. No. 51607084)

This is an appeal from judgment after a jury convicted defendant Sherri Gordon of misdemeanor assault, the lesser included offense of count 1, infliction of corporal injury on a child, and acquitted her of count 2, child abuse likely to cause great bodily injury. On appeal, defendant contends that reversal is required because the trial court failed to instruct the jury that it must unanimously agree on which of several acts alleged by the prosecution constituted the misdemeanor assault. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 2016, an information was filed charging defendant with infliction of corporal injury on a child (Pen. Code, § 273d, subd. (a)) (count 1) and child abuse likely to cause great bodily injury (Pen. Code, § 273a, subd. (a)) (count 2).[1]

At trial, defendant's 17-year-old daughter, Jane Doe, testified that she had a very volatile relationship with defendant, with whom she lived in Discovery Bay. According to Doe, the two often argued and defendant sometimes hit her with a belt or extension

[1] Unless otherwise stated, all statutory citations herein are to the Penal Code.

cord, which was "really painful." Once, defendant threatened to "break all [of Doe's] fingers off" if she called the police following an argument.

At about 9:00 p.m. on July 27, 2015, the evening before Doe was to begin her junior year of high school, she was confronted by defendant, who accused Doe of taking her sriracha sauce from the kitchen. Defendant threatened that if Doe did not give her the sriracha sauce, defendant would refuse to give Doe the registration papers she would need to enroll in school the next day. When Doe told defendant she did not have the sauce and that she would be unable to start school without the papers, defendant responded that she did not care where Doe went to school and that she must find the sauce.

Doe went downstairs to the kitchen and looked through the cabinets for the sriracha sauce, loudly slamming each one after confirming the sauce was not there. Two minutes later, defendant entered, upset. She grabbed the back of Doe's neck as the two screamed at each other. After arguing for about 10 minutes, defendant slapped Doe in the face twice with an open palm. Doe tried to go upstairs, but defendant grabbed her by the neck again and turned her around, striking her again in the face. Doe tried to push her away. Defendant then bit Doe "[r]eally hard" on the shoulder, leaving teeth marks.

Doe went upstairs to her bedroom and grabbed a blanket to take to the home of their friend, Conteena Williams, who lived across the street. Defendant followed Doe, snatching the blanket from her hands and warning: "You're not going to go out there with my stuff." Doe nonetheless left the house and walked toward Williams's house, with defendant following her, continuing to argue. Once near the driveway, defendant ran toward Doe and again grabbed her neck. According to Doe, "That's when we started fighting." Defendant struck Doe on the back of the neck while Doe tried to grab and push defendant. They each grabbed and ripped each other's shirt. After about two minutes, Doe pulled away and went to Williams's house.

Williams let Doe into her house. About five minutes later, defendant came to the door, telling Williams that Doe was rude, disrespectful and out of control. Defendant insisted Doe return home, so Williams convinced Doe to go with defendant.

Defendant testified in her own defense at trial. Defendant stated that, about four days before the incident at hand, she and Doe had a plan to go to Liberty High School to complete Doe's registration paperwork. Doe, however, was not ready to go at the appointed time, so defendant went without her and picked up the paperwork. When defendant got home, she discovered Doe had run away. Doe returned four or five days later.

According to defendant, on July 27, 2015, Doe, still upset defendant had gone without her to get the school registration papers, began "opening and closing the cupboards really hard." Defendant told Doe to close the cupboards and go upstairs, but Doe refused. Defendant then approached Doe, prompting Doe to turn around and begin "cutting on" defendant's arm with an unidentified object. Defendant grabbed Doe's arm and tried to stop her, but Doe reached toward defendant's neck and burned her with another unidentified object. Defendant bit Doe's shoulder to stop her attack.

Doe went to her room and began to pack a bag. She then tried to leave to go to her neighbor's house, but defendant ordered her to put the bag down. Doe "threw the bag down and . . . ran out the door." Doe went to the neighbor's house, and defendant followed her minutes later, ordering her to go back home. Once there, defendant was "upset" and "probably screaming." Doe again ran outside and, once there, began kicking defendant's dog. Defendant ran outside to get the dog away from Doe, at which point Doe grabbed defendant's shirt and ripped it. They continued to fight, with defendant grabbing and ripping Doe's shirt. Finally, defendant was able to retrieve her dog and return to her house.

On December 16, 2016, the jury convicted defendant of misdemeanor assault (§ 240), the lesser included offense of count 1, and acquitted her of count 2, child abuse likely to cause great bodily injury. The trial court sentenced defendant to three years of probation and, on February 2, 2017, she timely appealed.

DISCUSSION

Defendant contends the trial court prejudicially erred by failing to instruct the jury that jurors must unanimously agree on which of several acts constituted the simple

assault in order to convict her of the lesser included offense charged in count 1. The governing law is as follows.

"Because jury unanimity is a constitutionally based concept, '. . . the defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged.' (*People v. Jones* (1990) 51 Cal.3d 294, 305 [270 Cal.Rptr. 611, 792 P.2d 643].) From this constitutional origin, the principle has emerged that if the prosecution shows several acts, each of which could constitute a separate offense, a unanimity instruction is required. [Citations.]" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534 [reversible error occurred where two separate acts of making terrorist threats were alleged, each of which could have been charged as a separate offense, yet the trial court nonetheless failed to give a unanimity instruction].)

Accordingly, "[w]hen an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.] The duty to instruct on unanimity *when no election* has been made rests upon the court sua sponte. [Citation.]" (*People v. Melhado*, *supra*, 60 Cal.App.4th at p. 1534, italics added.)

Under this standard, "[t]he prosecutor's statements and arguments [may be] an election for jury unanimity purposes. (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1455 [121 Cal.Rptr.2d 627]; *People v. Diaz* (1987) 195 Cal.App.3d 1375, 1382–1383 [241 Cal.Rptr. 366].)" (*People v. Mayer* (2003) 108 Cal.App.4th 403, 418–419; see also *People v. Sutherland* (1993) 17 Cal.App.4th 602, 611–612 ["It is established that some assurance of unanimity is required where the evidence shows that the defendant has committed two or more similar acts, each of which is a separately chargeable offense, but the information charges fewer offenses than the evidence shows"].) Moreover, the prosecutor's election excuses the trial court from having to give the juror unanimity instruction. (*People v. Melhado, supra,* 60 Cal.App.4th at p. 1534.)

A unanimity instruction is also excused "if the evidence shows one criminal act or multiple acts in a continuous course of conduct." (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.) "The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

Here, we conclude the trial court committed no error in failing to instruct the jury sua sponte that unanimity was required to support a guilty verdict on the assault count. "The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*People v. Russo* (2001) 25 Cal.4th 1124, 1134–1135.)

In this case, the record clearly reflects the prosecutor elected with respect to count 1, infliction of corporal injury on a child, to argue to the jury that the underlying criminal act willfully committed by defendant was biting Doe's shoulder.[2] Specifically, the prosecutor's argument in relevant part was as follows:

[2] The jury was instructed with respect to count 1 (§ 273d, subd. (a)) that proof of the following was required: (1) willful infliction on a child of a cruel or inhuman physical punishment or injury, (2) which causes a traumatic physical condition, and (3) is inflicted by defendant who, when acting, was not reasonably disciplining the child.

"So on Count One, the defendant is charged with inflicting physical punishment on a child. There are three elements. [¶] . . . [¶] Now, there's no dispute that the defendant willfully bit her daughter in this case. (Jane) testified she was bit. Witnesses corroborated her testimony that she was bit, and the defendant herself yesterday told us she bit her daughter. [¶] . . . [¶]

"And the law does not permit a parent to inflict cruel or inhuman punishment or injury on a child regardless of what [the child does] wrong. [¶] Biting is a form of cruel or inhuman physical punishment. It is one thing for a parent to hit a child with their [*sic*] hand. There is absolutely no reason for a parent to bite their [*sic*] child as a punishment. It's clearly and [*sic*] intent to injure. [¶] . . . [¶]

"There's no question that the defendant's act of biting her daughter caused a traumatic condition. It caused a wound. Biting a person is going to result in the application of force. [¶] Because common sense tells you that when the defendant clamped her jaws down on her daughter's shoulder to bite her, this was an application of force. That bite would . . . directly and probably result in contact and force. [¶] A bite mark with upper and lower teeth marks resulted, and that condition never would have happened without that bite. [¶] . . . [¶]

"Finally, there is no reasonable scenario in which biting a person let alone a child is reasonable discipline. [¶] This is not a slap or a strike with a hand, a belt, or a cord. This was a sustained attack. [¶] The People have proved the elements of Count One beyond a reasonable doubt."

Given this record, we conclude the prosecution made a clear election of the specific act relied upon to prove the criminal act underlying count 1—to wit, defendant's act of biting Doe's shoulder. Accordingly, we agree with the People that the trial court had no sua sponte duty in this case to give a unanimity instruction to the jury. (*People v. Mayer*, *supra*, 108 Cal.App.4th at pp. 418–419.)

Lastly, in so concluding, we find defendant's authority, *People v. Melhado*, *supra*, 60 Cal.App.4th 1529, inapposite. There, the prosecutor made an election among several alleged incidents of making terrorist threats in violation of section 422 before defense

counsel and the court, but out of the jury's presence. The prosecutor thereafter focused his closing argument on one particular incident to support the count alleging a violation of section 422, but also discussed the other incidents, in the prosecution's words, "only as embellishments to the retelling of the tale." (*Id*. at p. 1535.) The reviewing court found this to be prejudicial error, explaining: "Because the prosecutor did not directly inform the jurors of his election and of their concomitant duties, it was error for the judge to refuse a unanimity instruction in the first instance and to disregard his sua sponte duty thereafter." (*Id*. at p. 1536.) In our case, to the contrary, the prosecutor identified for the jury the three essential elements of the count 1 offense, and then walked them through the evidence relevant to each element *only as to the specific act of biting Doe's shoulder*. In so doing, we conclude, the prosecution met its duty to make an election tying the specific count to a specific criminal act. (*People v. Diaz, supra,* 195 Cal.App.3d at pp. 1382–1383 [no sua sponte duty to give juror unanimity instruction where "the prosecution in the instant action made an election in his opening argument to the jury tying each specific count to specific criminal acts elicited from the victims' testimony"].) We therefore affirm.

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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Siggins, P. J.

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Fujisaki, J.